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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR BAUTISTA,

Defendant and Appellant.

B196416

(Los Angeles County
Super. Ct. No. BA272035)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kathleen Kennedy-Powell, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, J. Michael Lehmann, and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Edgar Bautista challenges his conviction for two counts of first degree murder with gang and firearm enhancements. He argues the record lacks sufficient evidence to support the conviction; the trial court should have admitted double hearsay statements that someone else committed the crime; and the prosecutor committed misconduct by eliciting testimony that one of the victims was in a fight with a member of Bautista's gang. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 27, 2004, Raul Ramirez and Wilfredo Sarabia were shot on Harvard Avenue. Someone called 911 between 8:12 and 8:14 p.m. Both victims died of the gunshot wounds. Bautista was charged with two counts of first degree murder. Gang and firearm enhancements were alleged. The special circumstance of multiple murders and appellant's status as a minor were alleged. Identification was the issue at trial as defense counsel stated: "The question in this case is who done it, and it's as simple as that."

Following the first trial, the jury could not reach a verdict. Following a second trial, the jury convicted Bautista of both counts of first degree murder and found the enhancements to be true.¹ Unless otherwise indicated, all further statements of fact are based on appellant's second trial.

After the jury verdict in the second trial, Bautista was sentenced to two consecutive 25-years-to-life terms for the murder counts and two consecutive 25-years-to-life terms for the Penal Code section 12022.53, subdivision (d) enhancements. Bautista timely appealed.

¹ The jury also found true that he personally used a handgun within the meaning of Penal Code section 12022.53, subdivisions (b), (c), (d), and (e)(1). The jury found that the offenses were committed to promote, further or assist in criminal conduct by gang members within the meaning of Penal Code section 186.22, subdivision (b)(1).

1. Identification Evidence

Jessica Ormeno testified that, on September 27, 2004, at around 7:00 p.m., she saw appellant and his friend walking toward Harvard Avenue. Appellant took out a gun. Ormeno was scared; she went home; and two minutes later, she heard eight gunshots. Ormeno knew appellant as “Youngster.”

Karen Flores testified she knew appellant as Youngster from the Aztlan gang. At around 8:15 p.m. on September 27, 2004, she saw a person shooting the two victims and saw a spark from the gun. The shooter was dressed in black, but she did not see his face. Appellant was close to the shooter, about three feet. Flores was in custody when she testified and at the time of the shooting she was a member of a tagging crew that did not get along with Aztlan, and she disliked appellant.

During trial, Flores testified that she did not tell the detective immediately after the shooting that Youngster was responsible. In contrast to Flores’s in-court testimony, Detective Brian Valle, testified that 20 minutes after the shooting, Flores told him repeatedly, “That fool Youngster shot him.”

Alejandro Gonzales testified that he saw the shooter but was unable to identify him. Gonzales also testified the shooter was not alone but was with a companion. Gonzales testified that appellant did not look like the shooter.

In contrast to his in-court testimony, on September 28, 2004, Gonzales identified appellant as the shooter. At the preliminary hearing, Gonzales stated that appellant did not look like the shooter. There was evidence that appellant threatened Gonzales at a prom as testified to by both Gonzales and his prom date.

Rocio La Voie, a social worker, witnessed the shootings. She testified appellant was not the shooter. She identified someone else as resembling the shooter, but the record does not show whether appellant’s photo was included among those she reviewed. La Voie testified that the shooter was alone.

2. Autopsy Evidence

According to Dr. Juan Carrillo, a medical examiner for the Los Angeles County Department of the Coroner, Ramirez sustained a single gunshot wound to the head.

Ramirez had stippling behind his left ear, on the arm, and on the scalp. “Stippling is the burning and unburnt gun powder that gets emitted along with the projectile from the barrel.”

Sarabia had three gunshot wounds. He also had stippling near at least one of the entry wounds. Sarabia had abrasions on his back, which the coroner hypothesized either were the result of his falling on his back or of his being on his back when he was shot.

The coroner had different hypotheses as to how the crime was committed based on the victims’ wounds. Based on the placement of the wounds, the coroner believed that the shooter may have been standing to the left of Sarabia and shot downward. The wounds were consistent with a person standing between the two victims and shooting at both. It was also possible that the shooter was taller than the victims, who each were five feet five inches tall.

The coroner testified that stippling can go from a few inches up to about two feet. But, he also testified the wounds were “consistent with someone, being a distance away, continuing to fire.” The amount of stippling suggested that the gun was held closer to Sarabia’s head than to Ramirez’s head. The stippling also suggested that if the gun was fired from a distance greater than two feet, the person may have been lying on the ground when the shots were fired.

3. *Gang Evidence*

There was evidence that appellant was a member of the Aztlan gang and that his moniker was Youngster. Detective Brian Valle testified as a gang expert. He testified that Mara Salvatrucha (MS) and Aztlan were rival gangs. The primary activity for the Aztlan gang was extortion and secondary activities included robberies, murders, and drug sales. Another Aztlan gang member, Montalo Lazaro, was convicted of attempted robbery and assault with a firearm. Juan Lopez, another Aztlan member, was convicted of attempted extortion and possession of a blade.

Harvard Avenue is the border between the territory claimed by the Aztlan gang and that claimed by the MS gang. The victims were killed on the MS side of Harvard

Avenue. If an Aztlan gang member goes into MS territory to commit a murder, it does not matter whether it is a gang member or innocent person who is killed because it has the effect of informing the gang that its territory has been invaded. An Aztlan member killing two people in MS territory would be for the benefit of the Aztlan gang because it would elevate the perpetrator's status, instill fear in the community, and send a message to the rival gang.

Gangs gain respect by committing acts of violence against other gangs and against community members to make them live in fear. Gang members commit crimes to show loyalty to the gang. Detective Valle explained that, in gang cases, it was common for a witness to be afraid to make an in-court identification.

DISCUSSION

I. Sufficiency of the Evidence

Appellant argues the record lacks substantial evidence to support his convictions for first degree murder. His theory is one of misidentification. According to him, the coroner's testimony contradicts the prosecution's eyewitnesses, who testified that the shooter was at the intersection of two streets. No eyewitness identified appellant in court. Appellant maintains that La Voie's testimony was stronger than that of the prosecution witnesses because it was consistent with the coroner's testimony. (Appellant does not challenge the sufficiency of the evidence for the enhancements.)

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) "The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Rodriguez*, at p. 11.)

The evidence is sufficient to support the verdict. Flores and Gonzales both identified appellant as the shooter shortly after the incident. The jury could have inferred that they were afraid to make an in-court identification and that their out-of-court identifications made shortly after the killings were trustworthy, especially since Flores knew appellant. There was evidence that appellant threatened Gonzales, and Detective Valle testified that in gang cases witnesses were often scared to testify in court. Even though no witness identified appellant during the trial, there was substantial evidence that appellant was the person who committed the killings.

That appellant finds La Voie’s identification more persuasive or that there were discrepancies between the witnesses testimony does not show the record lacks substantial evidence. As the Attorney General points out, the person identified by La Voie after she witnessed the killings had facial feature similar to appellant’s features at the time of the crime. Even defense counsel acknowledged that the person La Voie identified “looks like . . . Bautista a little bit.” But assuming the person La Voie identified had looked nothing like appellant, the jury as trier of fact was tasked with weighing the evidence and deciding which witnesses to credit. “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The jury must have believed the prosecution witnesses and their testimony provided sufficient evidence.

Finally, contrary to appellant’s argument, the medical testimony did not contradict the prosecution witnesses. While, the coroner testified the wounds were consistent with someone firing at close range, he also testified they were “consistent with someone, being a distance away, continuing to fire.” Defense counsel argued that

La Voie's testimony was more consistent with the coroner's testimony, but the jury must have rejected that argument.

II. Evidence That Someone Else Committed the Crime

Additional factual background is required to analyze appellant's argument that the trial court erred in excluding testimony of an officer who would testify to statements made by Omar Mireles. The Attorney General argues that this contention is forfeited and in any event lacks merit.

In appellant's first trial, defense counsel sought to admit the testimony of Mireles. Defense counsel represented that Mireles was a paid police informant and was a member of the MS gang. Defense counsel further explained that Mireles had been helpful in other investigations of the MS gang and was considered to be a reliable informant. According to counsel's offer of proof, Mireles informed an officer that "he knew that two guys had gotten shot." According to counsel, in Mireles's statements to a police officer, Mireles said a member of the MS gang named Scrappy asked to "do a mission" in the Aztlan territory and then a few minutes later Mireles heard several shots. Mireles told the officer that Scrappy then returned saying, "Hey, I just shot two guys. . . ."

The court never heard these statements from Mireles. Mireles refused to answer questions, indicating that he had the right against self-incrimination under the Fifth Amendment to the United States Constitution. The court agreed.

Once Mireles's testimony could not be provided for the jury, defense counsel argued that the officer with whom Mireles spoke should be allowed to testify regarding Mireles's statements. Appellant argued Mireles's statements were declarations against interest under Evidence Code section 1230 (section 1230). The court found that the evidence was not sufficiently reliable; was not a declaration against his own interest because he was being paid to provide the information. Appellant argues that the statements should have been admitted under section 1230 and the error in excluding them requires reversal.

A. *The Issue Was Not Forfeited*

In the second trial, appellant did not argue that Mireles's statements constituted statements against his interest. The issue, however, was not forfeited because the record indicates that the trial court did not want evidentiary issues that had been raised in the first trial relitigated in the second trial. Unfortunately, our evidence of this is from a reconstruction of an unrecorded in-chambers conference. But the court confirmed defense counsel's recollection stating that "I may have said that I didn't want to relitigate things that we had already litigated." Therefore, the record indicates that raising the same objection in the second trial would have been futile. (*People v. Wilson* (2008) 44 Cal.4th 758, 793.)

B. *There Was No Error in Excluding the Officer's Testimony of Mireles's Statements*

"With respect to the penal interest exception, the proponent of the evidence 'must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 153.) The exception does not apply to portions of a statement that do not "disserve[]" the interests of the declarant. (*Ibid.*) "'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interests within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.'" (*People v. Geier* (2007) 41 Cal.4th 555, 584.) We review the trial court's determination for abuse of discretion. (*Lawley, supra*, at p. 153.)

There was no abuse of discretion. Mirales did not inculcate himself; he inculcated Scrappy. The statements were not against Mireles's penal interest but against Scrappy's. The only portion of the statement that arguably could be construed

as against Mireles's penal interest is that he was a gang member. But that statement was not relevant to any issue in Bautista's trial. Cases Bautista cites for the proposition that when a person makes a statement that inculpatates him, the statement is viewed as trustworthy are inapposite because Bautista has not shown that Mireles made any relevant statement that inculpatates himself.

Appellant next argues that the statement had the potential to subject him to risk of retaliation by his gang members. But he fails to show that it "created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true. (§ 1230; see also *Lawley, supra*, 27 Cal.4th at p. 155.) Assuming that the statement would subject Mireles to disgrace within the MS gang, that does not indicate he would not have made the statement unless he believed it to be true. The trial court found that he made it because he was paid. Moreover, the only evidence that is relevant in this case is Scrappy's alleged involvement in the killings. That evidence would not subject Mireles to ridicule in the MS gang.

Appellant also argues that the exclusion of the evidence rendered the proceeding so fundamentally unfair as to violate due process. For this argument, he relies on *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997 and *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*). In *Chia*, the defendant was convicted of being an accomplice to murder and participating in a conspiracy. (*Chia*, at p. 999.) The trial court excluded statements from a coconspirator (Wang) that defendant had nothing to do with the conspiracy. (*Ibid.*) The Ninth Circuit found that the exclusion of reliable material evidence of the defendant's innocence violated his right to due process. (*Ibid.*) Wang told police that the defendant had warned him not to go forward. The court explained that the statement implicates Wang by removing doubt as to his mens rea. (*Id.* at p. 1004.) Other statements where Wang described the planning of the crime also inculpatated him. (*Id.* at p. 1006.) In *Chia*, the court found the statements that inculpatated Wang and exculpatated the defendant were reliable. But here, as already

explained there were no similar indicia of reliability because Mireles's statements bore on Scrappy's culpability not on Mireles's.

In *Chambers*, *supra*, 410 U.S. 284, the defendant was convicted of murdering a policeman. (*Id.* at p. 285.) The defendant sought to admit evidence that someone else had confessed to the crime on four occasions, including the testimony of three separate witnesses that McDonald confessed. (*Id.* at pp. 289-293.) "The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence The sheer number of independent confessions provided additional corroboration for each. Third . . . each confession here was in a very real sense self-incriminatory and unquestionably against interest." (*Id.* at p. 300.) The high court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Ibid.*)

In contrast to *Chambers*, here there was another level of hearsay because it was Scrappy's, not Mireles's, statements that were relevant. There was no evidence of repeated statements by Scrappy and no evidence of who Scrappy was. The statements were not against Mireles's interest. Nor were they corroborated. For example, Mireles's statements indicate that the killings occurred in Aztlan territory where Detective Valle indicated that it was MS territory. Appellant does not show that his federal due process right was violated. Finding no error, we do not discuss appellant's argument that the error was prejudicial.

III. Prosecutorial Misconduct

Appellant argues that the prosecutor engaged in prejudicial misconduct in asking victim Ramirez's cousin whether Ramirez had fought with a member of the Aztlan street gang. He argues that his counsel's belated objection and motion for a

mistrial constituted ineffective assistance because counsel failed to timely object. Additional factual background is necessary to understand the argument.

Prior to Mario Diaz's testimony, defense counsel asked for an offer of proof. The prosecutor stated, "[Diaz] establishes that [Ramirez] has been hanging out with a gang member by the name of Smokey. Because we have to prove the [Penal Code section] 186.22, that this was in regards to a gang." The prosecutor intended to ask "who has [Ramirez] been hanging out with recently," hoping to elicit that it was with a gang member. Diaz testified that Ramirez hung around with a friend who was in the MS gang. The prosecutor also asked, "Are you aware of any problems that Raul Ramirez was having with any Aztlan gang members before September 27, 2004?" Diaz testified "he had a fight" about three months before he was killed. On cross-examination, Diaz testified that neither Ramirez nor Sarabia were gang members.

After the jury was excused, defense counsel argued that the prosecutor exceeded the offer of proof when she elicited testimony that Ramirez had a fight with an Aztlan gang member. The court admonished the prosecutor for exceeding the scope of the offer of proof without asking for permission. The court faulted defense counsel for not immediately objecting, but instead waiting until the witness left the stand. Defense counsel responded, "[A]s to the timeliness of my objection, as a strategic matter once it's out there, once you lead the witness . . . it's out there, the jury has already heard it."

Appellant argues that the testimony was inadmissible hearsay and that the prosecutor's tactics precluded the defense from the ability to challenge the evidence. He argues that "it was only a small leap for the jurors to consider that if Raul Ramirez was friendly with an MS gang member, and had recently engaged in an altercation with the rival Aztlan gang, there was a motive for an Aztlan gang member to kill him."

We are skeptical of appellant's prosecutorial misconduct argument as he does not show that the evidence was inadmissible. (*People v. Chatman* (2006) 38 Cal.4th 344, 380; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 30, fn. 7.) Appellant states that the testimony was hearsay, but the record does not show that it was based

on an out of court statement. We also are skeptical of appellant's ineffective assistance of counsel argument, where counsel acknowledged that he had a strategic reason for not objecting to the testimony. (*Chatman*, at p. 384.) But even if we assume for purposes of this appeal that appellant has demonstrated the elicitation of this evidence without an immediate objection rose to such error, in order to show that a reversal of his conviction is warranted, he must show prejudice. (*People v. Lopez* (2008) 42 Cal.4th 960, 966; see also *Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Hill* (1988) 17 Cal.4th 800, 844.)

There was no prejudice in this case. This case centered on the eyewitness testimony. Defense counsel elicited testimony that neither victim was a member of the MS gang, negating the inference that the victims were shot because of their membership in a rival gang. The evidence that Ramirez was in a fight with an Aztlan gang member was not important to the prosecution case. Only defense counsel relied on it during argument. The prosecutor argued appellant went into MS territory to kill someone in order to "plac[e] that neighborhood in fear." She argued "defendant committed this crime because he wanted recognition from his gang. He wanted to be recognized as the hardcore gangster that he is." She argued that Flores and Gonzales's identifications were credible. The prosecutor argued it did not matter whether the victims were in MS or associated with MS, the important point was that the killings occurred in MS territory. The prosecutor's argument was supported by Detective Valle's testimony that it did not matter who was killed but that the killing occurred in MS territory.

Therefore, that one of the victims associated with a member of MS was not important to establishing a motive and was not evidence central to appellant's trial. Bautista's argument that "it was only a small leap for the jurors to consider that if Raul Ramirez was friendly with an MS gang member, and had recently engaged in an altercation with the rival Aztlan gang, there was a motive for an Aztlan gang member to kill him" is not persuasive because there was no claim that this killing occurred because Ramirez associated with a member of the MS gang or was in a fight with a

member of the Aztlan gang. As the Attorney General points out, the argument is not applicable to Sarabia, and the jury found Bautista responsible for Sarabia's death. Even if the prosecutor should not have asked the question or defense counsel should have interposed a speedier objection, the assumed error does not require the reversal of the judgment.

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

BIGELOW, J.